(5)

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

APPLICATION U/S 482 Cr.P.C.
U/S-3180786.

आदेश पत्रक

मामला क्रमांक Cri. M.P. 112 सन् 2006

In Reference विरुद्ध Statement C.H.

Single Bench

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
(J)		10.10.06 P.U.D. registered as Cri. M.P. in compliance of Q(J) order dt. 09.10.06 in the reference made by Shri P.K. Dave, A.S.J. Balod, Distt. Durg

AFR (11)

HIGH COURT OF CHHATTISGARH, BILSPUR

Criminal Misc. Petition (Ref.) No.112/2006

in a reference (State –vs- Deepak Kumar Sahu)

ORDER

Post for 04.12.2006

Sd/-
SUNIL KUMAR SINHA
Judge

02.12.2006

(12)

APR

HIGH COURT OF CHHATTISGARH, BILSPUR

Criminal Misc. Petition (Ref.) No.112/2006

in a reference (State –vs- Deepak Kumar Sahu)

Appearance:

Shri G.K. Beriwal, Deputy Advocate General for the State.

Shri B.P. Singh, Advocate for the accused Deepak Kumar Sahu.

ORDER

(04.12.2006)

Sunil Kumar Sinha, J,

(1) This is a reference made u/s 318 of the Code of Criminal Procedure by the Addl. Sessions Judge, Balod, Distt. Durg (C.G) in Sessions Trial No.163/2006 (State –vs- Deepak Kumar Sahu) wherein the learned Addl. Sessions Judge, passed a judgment and order of conviction against the accused holding him guilty of an offence punishable u/s 376(2)(f) of I.P.C.

(2) The case of the prosecution is that on 03.2.2006 at about 6 p.m., the accused took the prosecutrix, Ku. Bineshwari (P.w.3), a girl aged about 8 years, in a Kotha where the cattle straw is kept, and committed sexual intercourse against her. The said incident was witnessed by Gasobai @ Yogeshwari (P.W.2) who reached to the spot, on hearing cries of the girl and saw that the accused was lying on the girl and was committing sexual intercourse. After seeing Gasobai, the accused ran away

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from the spot. Gaso Bai reported the matter to the mother of the prosecutrix namely Kiran Bai (P.W.4) and ultimately a report was lodged to the police. The girl was medically examined by Dr. Vinita (P.W.6) on 04.2.2006 who found that the there were 12 teeth in the upper jaw and 12 teeth in lower jaw. The girl was of the weight of 18 Kgs., and axillary and pubic hairs were not developed. Secondary sexual characters were also not developed. She was a girl of normal mental condition. There were multiple small scratch abrasions, reddish in colour, over lower 2/3 portion of both legs (Anterior part). On the local examination, she found redness and inflammation present over the external genetilia and vagina. The urethra was also inflamed. The hymen was deep seated and was not ruptured. However, there were no injuries over cheek, breast, hip or thigh. She gave her opinion that the victim was sexually not matured and there were signs of recent vaginal penetration.

(3) The charge sheet was filed and the matter was committed to the Court of sessions and the sessions Judge framed charges u/s 376(2)(f) IPC, to which the accused denied and a plea of the accused was recorded accordingly after taking his signature over the charges framed. On the evidence, the prosecution examined as many as 11 witnesses. Thereafter, the matter was fixed for examination of the accused u/s 313 Cr.P.C., but the examination could not be conducted on account of the accused being deaf and dumb, therefore, without recording the accused statement, the Addl. Sessions Judge, fixed the matter for arguments and after hearing the final arguments, he passed the

judgment holding the accused guilty of the offence punishable u/s 376(2)(f) of IPC and referred the matter to this Court u/s 318 Cr.P.C., for passing an appropriate order.

(4) At the arguments, learned counsel for the accused argued that the jurisdiction exercised by the trial Court u/s 318 Cr.P.C., is not in accordance with law. He also argued that the conviction is based upon no material and the same should be set aside. He mainly relied on the decisions rendered in the matter of ***Emperor –Vs- Ulfat Singh, AIR (34) 1947 Allahabad 301*** and ***In Re: Boura @ Drigpal 2006(3) M.P.H.T.80***. On the contrary, learned State Counsel supported the conviction and also supported the course adopted by the addl. Sessions Judge by referring the matter to the High Court u/s 318 Cr.P.C.

(5) I have heard learned counsel for the parties at length and have also perused the records of the court below.

(6) In the case of *Emperor –vs- Ulfat Singh (supra),* the Allahabad High Court held that in dealing with a deaf and dumb accused charged with serious offences, it is essential for a Court to record a finding whether the accused can be made to understand the proceedings before passing an order u/s 341 Cr.P.C. (as it then was). It further held that where a deaf or dumb person is committed to stand his trial in the Court of session or is convicted, a reference has to be made u/s 341 as a measure of extra precaution so that the High Court may satisfy itself that under the circumstances, it was a fair trial or enquiry and in the case of an order of commitment, the High Court may

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further give directions as to how the trial may proceed in the Court of Session. In the matter of Boura @ Drigpal (supra) the accused was deaf and dumb but was not a lunatic or a person of unsound mind and he could not be made to understand even the gestures, he was tried for an offence of rape. The M.P. High Court said that in such a situation, section 318 of Cr.P.C. would be applicable and the trial has to proceed though the statement of the accused u/s 313 may not be recorded and upon the whole evidence the judgment can be passed.

(7) In ***AIR 1959 Kerala 165 (In re: Peethambaran)*** it was made clear that the provisions of section 341 (as it then was) can be invoked only when the accused is unable to follow the proceedings. The Court making reference should record a finding as to whether the accused, though a deaf, mute had sufficient intelligence to understand the criminal character of the act committed by him. To sustain conviction against such a person, the Court trying him should not only be satisfied that he is same but also that he is of sufficient intelligence as to know the criminal nature of the act he commits. There is no provision in the Indian Penal Code, under which a person found to be guilty of offence could be exempted from punishment merely because he is deaf and dumb. This decision has been relied on in the judgment of M.P. High Court in *Boura @ Drigpal's reference (supra).*

(8) Thus before the Court of enquiry or trial forwards the proceedings to the High Court u/s 318, it must be satisfied that the accused cannot be made to understand the proceedings and

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the enquiry or the trial must result in a conviction and if these two requirements are not fulfilled, the proceedings cannot be forwarded to the High Court. Therefore, it is clear that section 318 would clearly cover the case of a person who is a deaf and dumb and who cannot be made to understand the proceedings, though not insane. Want of speech and hearing does not imply want of capacity either in the understanding or memory but only a difficulty in the means of communicating knowledge, therefore, as an extra caution, the legislature has made the provisions of section 318 Cr.P.C., so that the High Court may satisfy itself that under the circumstances, it was a fair trial. The language used by the legislature in section 318 makes it clear that the Court cannot refer a case in the midst of a trial before any conviction takes place, the court is required to proceed to the end of the trial and it is only if the trial results in a conviction, then the question of forwarding proceedings to the High Court u/s 318 would arise.

(9) Now it has to be seen as to whether in case on hand, the learned A.S.J., has rightly taken the decision to refer the matter to the High Court after being satisfied in all above aspects?

(10) The very first order sheet recorded by the remand Court on 6.2.2006 is enclosed alongwith the records of the Sessions Trial. A perusal of the aforesaid order sheet would show that when the accused was firstly produced before the remand Court and a judicial remand was sought by the prosecution, it was told to the said court that the accused is a mute and in that situation the said Court asked the name of the accused who

gave his name in writing instead of telling it in speech and he also wrote the name of his father and village etc., thereafter only, a judicial remand was given. After hearing the charge arguments, the Sessions Court framed charges u/s 376(2)(f) of IPC and when it was explained and made to understand to the accused, he denied the charges and put his signature on plea recorded on the statement of charge framed on the said date. It is important to mention this fact here that the accused was represented by an engaged counsel through out, but, the counsel has not taken any such objection that the accused is unable to understand the proceedings or he is insane or he in fact does not understand the criminal character of the act alleged to have been committed by him. In this case, the accused was medically examined on 05.2.2006 by P.W.5 Dr.Vinod Kumar who has proved his report Ex.P.10. In the said report also he has mentioned that the accused was unable to talk. In the said circumstance, the trial commenced and ultimately on the date of recording of statement of accused i.e., 4-9-2006, the trial Court recorded that the accused is deaf and dumb and when the questions were asked to him, he makes gestures which mean that he is unable to hear and he is also unable to speak and he is not able to understand the questions. The trial court tried to make him understand the questions repeatedly, but the accused was unable to reply on the above account and on this ground the trial Court recorded that it was not possible to record the statement of the accused u/s 313 of Cr.P.C. On 26.9.2006 i.e., in reference order, the trial Court has mentioned this fact that the accused is deaf and dumb and he is

unable to understand the proceedings and is unable to reply the questions put to him, however, he is not a person of unsound mind or he is not an insane and in these circumstances, the trial Court has made reference to this Court. It is also important to mention that in almost all the orders sheets the accused has put his signatures in the column of signature of parties or pleaders, alongwith his lawyer, which he has written in Hindi. Therefore, it appears to me that these are the sufficient grounds for taking a view by the trial Court that the accused though was not of unsound mind cannot be made to understand the proceedings and the trial Court after recording a finding of conviction has rightly adopted the mode of referring this matter to the High Court u/s 318 Cr.P.C. The reference is in order and I hold it accordingly.

(11) Now I proceed to examine the evidence against the accused. The prosecutrix Ku.Bineshwari has been examined as P.W.3. She deposes vide para 1 that she was taken by the accused to his Kotha and thereafter the accused removed her underwear and he also removed his own underwear and he laid down himself over her. She further states that when she was trying to go to her house, she was again made to lay down by the accused. On a specific question being asked to her, as to what the accused was doing with her, she replies in the following manner :

"प्रश्न– कोंदा तुम्हारे उपरसोकर क्या कर रहा था, क्यों सोया था ?
उत्तर– साक्षी चुप रहता है कोई उत्तर नही दे रहा है । ऐसा प्रतीत होता है कि वह समक्ष नही पा रहा है ।"

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(12) P.W.2 Yogeshwari Bai is an eye witness to the incident. She deposes vide para 1 that after hearing the hue and cry of the prosecutrix in the Kotha of the accused, she went in side the Kotha and saw that the accused was lying over the prosecutrix and he was committing rape. When the accused saw her, he put his full pant and ran away from the spot and the girl, at once, came over to her, took her in her lap and started crying like "save me". Thereafter this witness called the mother of the prosecutrix. She deposes vide Para 6 in answer to a question that she had only seen the accused lying over the girl but she has denied this suggestion vide para 8 that it is not correct to say that only by seeing that the accused was lying on the prosecutrix she was saying that the accused was committing rape against the prosecutrix. That means, she had affirmed herself on the fact that she had seen the accused committing rape against the prosecutrix and on the hue and cry made by the prosecutrix she had reached to the sport. What is stated above is the outcome of the lengthy cross-examination of this witness.

(13) Dr.Vinita Komiya (P.W.6) is the witness who has examined the prosecutrix and who has proved her report Ex.P.11. As I have already stated in Para 2 (supra) that she had found the girl aged about 8 years and she had also found multiple small scratch abrasions, reddish in colour, over lower 2/3 portion of both the legs. In the local examination, she found redness and inflammation present over the external genetilia and vagina and the Urethra was also inflamed. The hymen was deep seated and it was not ruptured and she has given opinion that the victim

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was sexually not matured and there were signs of recent vaginal penetration.

(14) In case of a girl of tender age, rupture of hymen, in the event of penetration, is not as a matter of rule. In cases where the hymen is deep seated, it may not rupture though there may be a penetration. In case of a forcible attempt to penetrate also, there are chances that the hymen of the victim may not rupture particularly when it is deep seated. The presence of redness and inflammation over the vagina is atleast a sign that either a complete penetration has taken place or a partial penetration has taken place or a forcible attempt to penetrate was made against the victim. Modi opines in his Medical Jurisprudence that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum. ***Please see Modi's Medical Jurisprudence and Toxicology, 23rd Edn., Pg.928***. Presence of all these signs in the medical report of the victim alongwith the external injuries found over both the legs is suggestive of the fact that either a partial penetration has taken place or a forcible attempt to penetrate was made against the victim and the opinion of the Doctor that there were signs of recent vaginal penetration appears to be correct. So far as the age of the victim is concerned, there is evidence of mother namely Smt.Kiran Bai (P.W.4) who states in the first paragraph of her evidence that the girl was aged about 8 years. This statement is also supported by the evidence of lady Doctor who

also makes clinical observation that the victim was aged about 8 years and this has not been disputed by the defence also.

(15) In the facts and circumstances of this case, the trial Court has rightly held that the victim was less than 12 years of age and she was subjected to sexual assault by the accused. Though a clear evidence of complete vaginal penetration with discharge is not available on record but it is apparent on record that the accused forcibly attempted to commit rape on the victim with a result of partial penetration causing the aforesaid injuries to her. In the opinion of this Court, in the facts and circumstances, he has rightly been held guilty by the trial Court and he is liable to be punished u/s 376(2)(f) read with section 511 of IPC.

(16) In the result, the conviction of the accused is upheld. Instead of section 376(2)(f) IPC, he is held guilty of offence punishable u/s 376(2)(f) read with section 511 of the IPC. However, looking to the tender age of the accused and also looking to his physical condition that he is deaf and dumb, I deem it proper that a sentence of 5 years rigorous imprisonment would be adequate along-with a fine of Rs.1000/- in the peculiar facts and circumstances of this case.

(17) It is ordered that the accused shall suffer R.I. for 5 years and shall pay a fine of Rs.1000/-. In default of payment of fine, he shall suffer one year R.I. more. The sentence already undergone shall be adjusted in the sentence finally awarded to him. The criminal reference is disposed of on the terms referred to above.

Sd/-
SUNIL KUMAR SINHA
Judge

04.12.2006